

United States
Circuit Court of Appeals
For the Ninth Circuit. 12

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Montana.

FILED

APR 21 1922

F. D. MONCKTON,
CLERK

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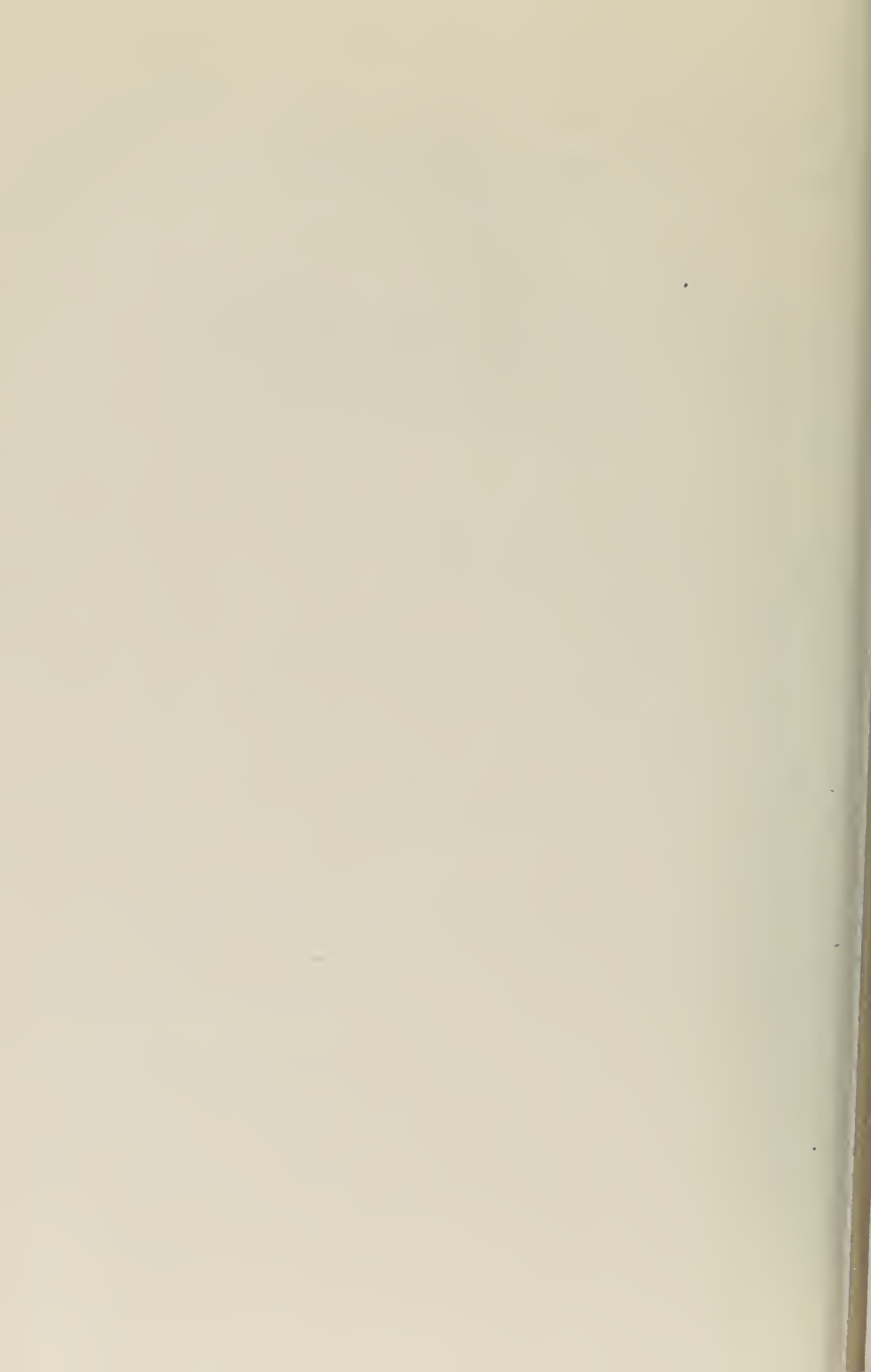
Transcript of Record.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Plaintiff in Error.

Hon. W. D. RANKIN, Attorney General of the State of Montana, of Helena, Montana,

Attorney for Defendant in Error.

In the District Court of the United States in and for the District of Montana.

Case No. 956.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State of Montana,

Defendant.

BE IT REMEMBERED, that on February 11, 1922, by leave of Court first had and obtained, an amended complaint was duly filed herein, being in the words and figures following, to wit: [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, District
of Montana.

THE CONTINENTAL OIL COMPANY, a Corpo-
ration,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Amended Complaint.

Now comes the plaintiff, and by this, its amended complaint herein, complains of the defendant and alleges:

I.

That the plaintiff is now, and has been since prior to January 1, 1921, a corporation organized and existing under and by virtue of the laws of Colorado, and a citizen of said State.

II.

That the defendant is, and has been since prior to January 1, 1921, the duly elected, qualified and acting treasurer of the State of Montana, and a resident and citizen of said State.

III.

That the plaintiff is now and has been since prior to January 1, 1921, engaged in and carrying on the business of selling gasoline and distillate in the State of Montana, and during the period from and including January 1, 1921, to and including March 4, 1921, actually sold and delivered in said

state, gasoline and distillate to the amount of 1,-305,874 gallons.

IV.

That the defendant, as such state treasurer, demanded of this plaintiff the payment of a license tax of one cent per gallon [2] for each gallon of gasoline and distillate so sold during the period aforesaid, and in making said demand assumed that Chapter 156 of the Session Laws of Montana 1921 required the payment of such tax, and that he was authorized thereby to demand and collect the same.

V.

That if said statute is construed and held to require this plaintiff to pay a license of one cent per gallon for each gallon of gasoline and distillate sold during said period for conducting, engaging in and carrying on such business after March 4, 1921, it is in conflict with the fourteenth amendment to the Constitution of the United States in that it denies to plaintiff the equal protection of the laws by requiring plaintiff and others engaged in and carrying on such business prior to March 5, 1921, to pay a higher license tax for engaging in and carrying on such business after March 5, 1921, the date when said statute went into effect, than those who commenced and carried on such business on or after said date; and if said statute is construed and held to be retroactive, and to require the payment of such license tax for having engaged in and carried on such business from and including January 1, 1921, to and including March 4, 1921, it is in conflict with the said fourteenth amend-

ment in that it deprives plaintiff of its property without due process of law.

VI.

That on August 3d, 1921, this plaintiff complied with the demand so made, and paid the said defendant, as state treasurer, the sum of \$13,058.74, which was at the rate of one cent per gallon for the gasoline and distillate so sold by plaintiff in the State of Montana during the period aforesaid.

VII.

That plaintiff, deeming the said license fee or tax demanded [3] and paid as aforesaid, unlawful, paid the same and the whole thereof under protest to the said defendant, as state treasurer, and the amount so paid has been deposited by said defendant, as state treasurer, in a special fund, designated "Protest License Fund," and is now held by him in said fund.

WHEREFORE, plaintiff demands judgment for the said sum of \$13,058.74, with interest thereon and costs of this action.

GUNN, RASCH & HALL,
Attorneys for Plaintiff. [4]

State of Montana,
County of Lewis and Clark.

M. S. Gunn, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason he makes this verification is because

there is no officer of the plaintiff now within the County of Lewis and Clark, State of Montana, wherein affiant resides.

M. S. GUNN.

Subscribed and sworn to before me this 11th day of February, 1922.

[Seal]

E. M. HALL,

Notary Public for the State of Montana, residing at Helena, Montana.

My commission expires Aug. 5th, 1922.

Filed Feb. 11, 1922. C. R. Garlow, Clerk.

Thereafter, to wit, on February 11, 1922, demurrer to amended complaint was duly filed herein, being in the words and figures following, to wit:
[5]

In the District Court of the United States, District of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State of Montana,

Defendant.

Demurrer to Amended Complaint.

Comes now the defendant in the above-entitled action and demurs to the amended complaint of the plaintiff on file herein upon the grounds and for

the reason that the said amended complaint does not state facts sufficient to constitute a cause of action.

WELLINGTON D. RANKIN,
Attorney General of the State of Montana, Attorney
for Defendant.

Filed Feb. 11, 1922. C. R. Garlow, Clerk.

Thereafter, to wit, on the 24th day of February, 1922, the decision of the Court sustaining the demurrer to the amended complaint was duly filed herein, being in the words and figures following, to wit: [6]

In the District Court of the United States in and
for the District of Montana.

No. 956.

THE CONTINENTAL OIL CO.

vs.

WALKER, State Treasurer.

Decision.

An act of the legislature of Montana approved March 5, 1921 (17 Sess. 288), provides in respect to dealers in gasoline and distillate, that "every dealer shall for the year 1921, and each year thereafter, when engaged in such business in this state, pay to the State Treasurer, . . . a license tax for engaging in such business in this state, equal to one cent for each gallon . . . sold or dis-

tributed by such dealer in this state during each year," and that "such license tax shall be paid in quarterly installments for the quarters ending, respectively, March 31, June 30, September 30, and December 31, in each year, beginning with the quarter ending March 31, 1921," and be paid within thirty days after the end of the quarter. The Act also provides that dealers shall keep records of sales, in form prescribed by state authority, and open to the latter's inspection. Penalties for violation of the Act are prescribed. Plaintiff alleges that it is and has been such dealer since prior to Jan. 1, 1921, and from Jan. 1, 1921, to and including March 4, 1921, it sold and delivered in Montana 1305874 gallons; that thereon and upon demand and under protest it paid to defendant as for said tax, \$13,058.74; that if said act be construed to require such payment as a license tax for carrying on such business after March 4, 1921, it denies to plaintiff that equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment. The relief asked is judgment for said sum.

Defendant demurs to the sufficiency of the complaint.

To deal with plaintiff's contentions in order, the first is that to measure the tax by sales made before the act's approval is to give the act a retroactive effect; that [7] Sec. —, R. C. Mont., provides no statute "is retroactive unless expressly so declared"; and that the act does not expressly so declare. Whether or not a statute that merely

refers to things past for a measure in respect to things future, is retroactive within the meaning of Sec. —, *supra*, it is believed that the act on its face conveys the meaning that sales past and before the act's approval shall to limited extent be the measure of the tax for the privilege of engaging in the business in the future and after said approval. The act says plainly enough that dealers "for the year 1921" and thereafter shall pay the tax in respect to sales "during each year," in "quarterly installments," "beginning with the quarter ending March 31, 1921." "Year," "year 1921," and "quarter ending March 31, 1921," as generally in statutes import the calendar year and quarter and without apportionment for that part of the year and quarter that had expired before the act's approval. And this is retroactive intent "expressly so declared" within the meaning of Sec. —, *supra*.

By analogy, see Curtis' Case, 49 Mont. 145.

Plaintiff's second contention is that to give the act this limited retroactive effect is to exact a license tax for having done business prior to the act; that the legislature is without authority to do this, because Art. 12, Sec. 1, of the state constitution provides that "the legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state," and Art. 3, Sec. 29 thereof, provides that "the provisions of this constitution are mandatory and prohibitory"; and that the import is that license taxes

can be imposed in respect only to business done subsequent to the act.

It is probable this construction of the constitution is right, but it is believed that plaintiff's application of it is wrong. The tax is not upon business done before the act was approved, but is upon the privilege of doing business after the approval. Although plaintiff did much [8] business in 1921 before the act was approved, had it ceased before the approval it would not have been subject to the act and tax. It did not cease, however, and continuing in business it is subject to the act and tax, the latter in part measured by the business done in 1921 before the act's approval.

The act approved, found plaintiff exercising the privilege of "doing business." This satisfies the constitution aforesaid, and to in part measure the tax upon the privilege of doing business, by business done, does no violence to the constitution. It is not uncommon to wholly measure license, privilege or excise taxes for any year by the business receipts of the preceding year. Although in some respects the act is not clear, it is believed this construction accords with what is permissible, and ascertains and sustains the legislative intent.

Plaintiff's last contention is that to thus measure the tax, imposes upon it a greater proportionate tax for the first quarter and year, than upon dealers engaging in business on or after the act's approval on March 5, 1921, and that this is unreasonable classification of dealers, denies to plaintiff equal

protection of the law, and deprives it of property without due process of law.

It is clear that in proportion to business done in the interval from March 5, 1921, to March 31, 1921, plaintiff paid a much greater tax for the privilege of doing business than did dealers who newly engaged therein during said interval,—if there were any. But since the Fourteenth Amendment does not prevent a state from adjusting taxation in all proper and reasonable ways, to that end it may classify occupations and those engaged in any particular occupation, according to its views of what is just and expedient, subject only to the limitation that in the light of the circumstances there must be reasonable if poor grounds therefor. So in respect to the act involved and which may have worked the disparity in taxes suggested aforesaid, the legislature no doubt was moved thereto by [9] considerations that dealers engaged in business before March 5, 1921, had an advantage in known location, good will and established trade which rendered the privilege for the balance of the year or quarter more valuable to them than was the like privilege to newcomers in the business; and that because thereof that value could reasonably be measured in part by business done during 1921 before the date aforesaid of the act.

There is sufficient reason in it to avoid the ban of the Fourteenth Amendment.

See *Clement Bank vs. Vermont*, 231 U. S. 120.

All taxation involves some lack of uniformity, some inequality. This is strikingly illustrated in property taxes. The owner upon March 1, though for but the day, pays the year's taxes, and the owner before and he after, pay nothing.

The demurrer is sustained.

Feb. 23, 1922.

BOURQUIN, J.

Filed Feb. 24, 1922. C. B. Garlow, Clerk.

Thereafter, to wit, on March 28, 1922, Judgment was duly entered herein in favor of the defendant, being in the words and figures following, to wit: [10]

In the District Court of the United States, in and for the District of Montana.

No. 956.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State of Montana,

Defendant.

Judgment.

This cause having come on regularly for hearing upon the demurrer of the defendant to the amended complaint of the plaintiff herein, and said demurrer

having been sustained, and the plaintiff having declined to amend or plead further, on motion of the attorney for the defendant;

It is ORDERED, ADJUDGED AND DECREED that the amended complaint herein be, and the same is hereby dismissed, and that the defendant recover his costs taxed at the sum of two and 45/100 Dollars.

Entered March 28, 1922.

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk.

Thereafter, to wit, on March 28, 1922, assignment of errors was duly filed herein, being in the words and figures following, to wit: [11]

In the District Court of the United States, in and
for the District of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Assignments of Error.

Comes now the above-named plaintiff, The Continental Oil Company, and presents and files, with

its petition for a writ of error herein, its assignments of error herein, as follows:

1. The Court erred in sustaining the demurrer of the defendant to the amended complaint in said action.

2. The Court erred in rendering judgment in said action, in favor of the defendant and against the plaintiff, dismissing the amended complaint of the plaintiff.

WHEREFORE, plaintiff prays that said judgment be reversed.

Dated this 28th day of March, 1922.

GUNN, RASCH & HALL.

Service of the foregoing assignments of error and receipt of a copy thereof is hereby admitted, this —— day of March, 1922.

Attorney for Defendant.

Filed March 28, 1922. C. R. Garlow, Clerk.
[12]

Thereafter, to wit, on March 29, 1922, bond on appeal was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, in and
for the District of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, The Continental Oil Company, a corporation, as Principal, and the United States Fidelity and Guaranty Company, a corporation, duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto J. W. Walker, as State Treasurer of the State of Montana, in the sum of Five Hundred Dollars (\$500.00), to be paid said J. W. Walker, as State Treasurer of the State of Montana, for which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 28th day of March, 1922.

WHEREAS, the above-named plaintiff has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause:

NOW, THEREFORE, the condition of this obligation is such that, if the above-named plaintiff shall prosecute said writ to effect and answer all costs, if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

Dated this 28th day of March, 1922.

THE CONTINENTAL OIL COMPANY,

By M. S. GUNN,

Its Attorney. [13]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

[Seal]

By CLINTON O. PRICE,

Its Attorney in Fact.

The foregoing bond is hereby approved, this 28th day of March, 1922.

BOURQUIN.

Filed March 29, 1922. C. R. Garlow, Clerk.

Thereafter, to wit, on March 29, 1922, citation was duly filed herein, the original citation being hereto annexed and being in the words and figures following, to wit: [14]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

To J. W. Walker, as State Treasurer of the State of Montana, and Wellington D. Rankin, Attorney General of the State of Montana, His Attorney:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein The Continental Oil Company, a corporation, is plaintiff in error and J. W. Walker, as State Treasurer of the State of Montana, is defendant in error, to show cause, if any there be, why the judgment is said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated this 28th day of March, 1922.

BOURQUIN,

United States District Judge for the District of Montana.

Service of the foregoing citation is hereby acknowledged, this 29th day of March, 1922.

WELLINGTON D. RANKIN,

Attorney General for the State of Montana, and
Attorney for Defendant. [15]

[Endorsed]: No. 956. United States Circuit Court of Appeals, Ninth Circuit. The Continental Oil Company, a Corporation, Plaintiff in Error, vs. J. W. Walker, as State Treasurer of the State of Montana, Defendant in Error. Citation on Writ of Error. Filed March 29, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [16]

Thereafter, to wit, on the 29th day of March, 1922, writ of error was duly filed herein, the original writ of error being hereto annexed and being in words and figures following, to wit. [17]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States for the District of Montana,
GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before you, between The Continental Oil Company, a corporation, plaintiff, and J. W. Walker, as State Treasurer of the State of Montana, is defendant, a manifest error hath happened, to the great damage of the said The Continental Oil Company, plaintiff in error, as by its complaint appears:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 27th day of April next, in the said Circuit Court of Appeals, that the record and pro-

ceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 28th day of March, 1922, the one hundred and forty-sixth year of the Independence of the United States of America.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court for the District of Montana, Ninth Circuit.

Let the foregoing writ of error issue.

BOURQUIN,

District Judge.

Service of the foregoing writ of error and receipt of a copy thereof is hereby admitted, this 27th day of March, 1922.

WELLINGTON D. RANKIN,

Attorney for Defendant in Error. [18]

Answer of Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States, for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the Honorable, the United

States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk. [19]

[Endorsed]: No. 956. United States Circuit Court of Appeals, Ninth Circuit. The Continental Oil Company, a Corporation, Plaintiff in Error, vs. J. W. Walker, as State Treasurer of the State of Montana, Defendant in Error. Writ of Error. Filed March 29, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [20]

Thereafter, to wit, on March 29, 1922, praecipe for transcript was duly filed herein, as follows, to wit:

In the District Court of the United States, in and
for the District of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

Pursuant to the writ of error issued in the above-entitled cause, you will please prepare, and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, a true transcript of the record in said cause, and the opinion of the Court on the demurrer to the amended complaint, and the assignment of errors, and all proceedings in the case.

Dated this 29th day of March, 1922.

GUNN, RASCH & HALL,
Attorneys for Plaintiff.

Filed March 29, 1922. C. R. Garlow, Clerk. [21]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 21 pages, numbered consecutively from 1 to 21, inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by praecipe filed, as appears from the original records and files of said court in my custody as such clerk; and I do further

certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of six & 80/100 Dollars, (\$6.80), and have been paid by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 30th day of March, A. D. 1922.

[Seal]

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk. [22]

[Endorsed]: No. 3857. United States Circuit Court of Appeals for the Ninth Circuit. The Continental Oil Company, a Corporation, Plaintiff in Error, vs. J. W. Walker, State Treasurer of the State of Montana, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed April 3, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

